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Moral Discourse, Bioethics, and the Law

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Dan Callahan follows a distinguished tradition when he uses the phrase "moral discourse" to describe the law's work. The frequency with which that image is deployed suggests its resonance and even rightness: When we think about the way society considers moral issues and develops moral positions, it can be useful to imagine the law as one of many social institutions that contribute to a social discussion. Nevertheless, this image is misleading.

At least for our (graying and balding) generations, the law is regarded as a worthy participant in American moral discourse preeminently because of its part in the civil rights movement, and particularly because of the Supreme Court's role in propelling school integration to the fore of public consideration and controversy. But what was the nature of the law's contribution to moral discourse in this paradigmatic context? First, it was crucially—though hardly exclusively—judicial. While legislation certainly can be, and often should be, seen as profoundly moral, in popular and even scholarly eyes legislation seems to be most easily regarded as the product of power politics, a coarse and cynical process of coalition and compromise. In contrast, courts have been more readily described as disinterested and principled.

Second, the moral discourse the law undertook in areas like civil rights can be characterized as "tutelary." In the crucial area of school integration, the Court is widely seen as having correctly perceived that the country had failed to deal honestly and decently with a great moral crisis of its history. Calling on the deepest moral lessons of the Constitution, the Court compelled the country to confront that crisis. In short, this paradigmatic moral discourse of the 1950s and '60s was the tutelary discourse of courts, acting as interpreters of the Constitution.

This tutelary role is no stranger to the law. It is, for example, characteristic of the criminal law. Academics and judges have often found the tutelary role a praiseworthy one for courts. Robert Burt, for example, sees the judge as a moral teacher who exercises a power "akin to the force wielded by the greatest moral teachers from Gandhi to Christ to Socrates . . ."[1] Nevertheless, the tutelary role is not entirely consistent with the image of moral discourse. Discourse denotes an exchange, a conversation. Discourse connotes a discussion among relative equals in which one side prevails through persua-

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sion, or even in which each side is brought to appreciate the other side's position and to accommodate its own position to the other side's arguments and insights. The idea of a tutelary discourse, which implies that the teacher knows something students do not, lives in some tension with this image of discourse.

But I think the distance between the law's work and the usual image of discourse is even greater than this tension suggests. For law, this kind of discourse is in important ways ultimately not tolerable. Law must establish rules for social interaction, and those rules must be reasonably clear and reasonably stable. Once announced, they must be obeyed. The law's discourse is tutelary and more, for it is instinct with coercion and demands acquiescence. In basic ways, then, much of what the law does is at odds with what the phrase "moral discourse" implies.

But this is true in yet a deeper sense. For communal life to be tolerable, adherence to law must be voluntary; it cannot always be compelled. Thus, legal institutions seek to inculcate not just obedience to their rulings, but acceptance of their principles. Once courts have announced their decisions, they become anxious that debate should end. For example, the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* sought to foreclose further discussion by "call[ing] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."[2] When the Court has intervened in public moral controversies and has, as it must, encountered resistance, it has become quite solemn and admonitory about the need to obey "the law of the land." The Court and its friends have often tried to shift the issue away from the substantive moral debate involved in a case and toward the question whether legitimate authority is to be obeyed. Thus the Court in *Casey* wrote that "[a] decision to overrule *Roe*'s essential holding . . . would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law" (p. 869). Once the judicial system has reached some sort of conclusion, then, courts are poor friends of moral discourse.

In short, I have been arguing that the law's discourse conflicts with what we ordinarily mean by discourse when it purports to reach an authoritative conclusion and enforces it by claims that further debate is inappropriate and by force. Indeed, it is exactly this aspect of legal discourse that makes it so attractive to partisans of all sorts. Law is more than debate. It is coercion. It is victory, or at least a gratifying step toward it.

Now, I am far from believing that the law's discourse ought never to be tutelary. The civil rights instance seems to me to exemplify a circumstance in which the law—indeed the courts—properly performed just such a role. But the law's tendency to inhibit rather than promote moral discourse suggests we should look carefully at what it can mean for the law to engage in moral discourse.

To begin with, the nature of the law's moral discourse will depend on which legal institution is acting. Not all institutions inhibit moral discourse as completely as others, or as conclusively. Legislatures, for example, write laws they hope to see obeyed. But in legislatures debate is expected and the views of any interested person or group may properly be expressed. Legislation is often formulated and debated over many years, and even decided issues can generally be renegotiated.

When courts act in their common law capacity—when, that is, courts employ their power frankly to make law as opposed to interpret statutes or constitutions—our tradition holds that although debate may be limited by the doctrine of *stare decisis*, courts are supposed to learn from the repeated encounters with social reality, which a series of cases provides, and to adjust to that reality. However, when courts act in their paradigm role in moral discourse—when they interpret the Constitution—they act least like participants in a discourse. It is then they are in principle interpreting a dispositive document, not expressing a moral position open to disputation and refutation. It is then they speak *ex cathedra*, with a claim to unique insight into the dispositive document and with a forbidding finality. It is then they close down the laboratories of democracy the states constitute in our federal system. It is then judges particularly resist changing their minds, as we know humans will, as *Casey* says courts must.

The peremptory nature of legal discourse is significant in two ways. First, discourse is generally supposed to promote, if not an understanding of the truth, at least the search for wisdom. But the debate-ending quality of the law can abort that process. Courts are parasitic institutions. Particularly when treating social and moral issues outside their usual scope, they depend on the moral insights of other social institutions. When courts try to reach final rules before the social debate has matured, they risk going woefully astray.

The peremptory nature of legal discourse is important in a second way. Discourse should help people work toward agreement, or at least toward a mutual accommodation of their disagreements. But when discussion is prematurely shut off, this cannot happen. I would argue that *Roe v. Wade*—whatever one thinks of its holding—was problematic from just this point of view, and that we continue to pay the price for it in a politics that cannot escape but can no longer usefully debate the issue of abortion.

Let me close by suggesting a lesson in what I have said for the most recent judicial foray into a strong, constitutional, preemptive version of tutelary moral discourse. The decisions of the Ninth and Second Circuits to make physician-assisted suicide a

constitutional right strike me as tutelary discourse misplaced. They constitute moral discourse of the most peremptory kind, since they preclude other governmental institutions from acting. Further, physician-assisted suicide has not had the kind of social debate that prepares courts to make informed and intelligent judgments. Nor do the conventional sources of judicial wisdom—here principally the Constitution—speak to this issue in ways that relieve judges of the need for the guidance and discipline of social debate.

Ethicists, clergy, journalists, doctors, lawyers, and private citizens have begun to debate assisted suicide in earnest. Legislatures, courts in their common-law capacity, and even the citizenry through referenda have engaged the issue in serious ways. This moral discourse has largely been conducted in thoughtful and productive ways that might still achieve what we hope for in discourse generally: some measure of wisdom and understanding, and some measure of agreement and accommodation. A seemly judicial modesty might lead courts to stay their constitutional hand and to permit *this* moral discourse to continue unmolested.

References

1. Robert A. Burt, "Pennhurst: A Parable," in *In the Interest of Children: Advocacy, Law Reform, and Public Policy*, ed. Robert H. Mnookin (New York: W. H. Freeman, 1985), p. 342.

2. 505 US 833, 867 (1992). ■